

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEWIS RAMOND BUYCK,

Defendant-Appellant.

UNPUBLISHED

April 8, 2014

No. 314008

Wayne Circuit Court

LC No. 12-003706-FC

Before: STEPHENS, P.J., and SAAD and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right from his bench trial convictions of assault with intent to murder (2 counts), MCL 750.83, attempted murder (5 counts), MCL 750.91, possession of explosive or incendiary device, MCL 750.211a, and attempted arson of a dwelling house, MCL 750.72. We affirm.

On November 6, 2011, an incendiary device was thrown at the home of Shaqueenah Egnis while she was home with her six children. Shaqueenah Egnis and her oldest child, Albert Egnis, testified that they witnessed defendant light a stick in a bottle, throw it at the window, and say something to the effect that he hoped Shaqueenah and the children would die. Defendant asserted that he was at his sister's house at the time. Although defense counsel filed a notice of alibi naming two witnesses, the witnesses did not appear at trial.

On October 25, 2012, the original date for sentencing, defendant's identified alibi witnesses appeared and the court adjourned the sentencing so that defendant could file a motion to reopen proofs. Subsequently, the trial court denied defendant's motion to reopen the proofs, noting that no caselaw was presented in support of the request to reopen the proofs, that no affidavits signed under oath were presented to the court, and no explanation was given as to why the witnesses failed to appear at trial.

Defendant first argues that defense counsel was ineffective for failing to secure the alibi witnesses for trial. No motion was filed requesting an evidentiary hearing to consider the claim. "When no *Ginther*¹ hearing has been conducted, our review of the defendant's claim of

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

ineffective assistance of counsel is limited to mistakes that are apparent on the record.” *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

Criminal defendants have a constitutional right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. In order to establish ineffective assistance of counsel, the defendant must show that: “(1) counsel’s performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012); see also *Smith v Spisak*, 558 US 139, 149; 130 S Ct 676; 175 L Ed 2d 595 (2010). Effective assistance of counsel is presumed and the defendant bears the burden of proving otherwise. *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012). A defendant must establish the factual predicate for his or her claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant asks this Court to assume that the alibi witnesses’ testimony would have been that defendant was not at Shaqueenah Egnis’s house because defendant was with them at a different location at the time of the crime. However, there was no affidavit filed by either alibi witness in support of this assertion. See *People v Pickens*, 446 Mich 298, 327; 521 NW2d 797 (1994). Therefore, it would be pure speculation to assume that the outcome of the proceedings would have been different had the testimony been given. Thus, defendant has failed to show that there is a reasonable probability that the result of the proceeding would have been different if the alibi witnesses testified. *Lockett*, 295 Mich App at 187. Accordingly, defendant’s ineffective assistance claim must fail.

Defendant next argues that the trial court abused its discretion in denying his motion to reopen the proofs so that he could call the alibi witnesses to testify. We review for abuse of discretion the trial court’s decision on a motion to reopen the proofs. *People v Herndon*, 246 Mich App 371, 419; 633 NW2d 376 (2001). A court abuses its discretion when it chooses a result that is outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007).

“Generally, the reopening of the proofs for either the prosecution or defense rests within the sound discretion of the trial judge.” *People v Collier*, 168 Mich App 687, 694; 425 NW2d 118 (1988). When evaluating whether the trial court abused its discretion on a motion to reopen the proofs, this Court will consider (1) if the conditions have changed, (2) if there would be an undue advantage to the moving party, (3) if the nonmoving party would be subject to surprise or prejudice, (4) the timing of the motion, and (5) whether the moving party is attempting to introduce newly discovered and material evidence. *People v Moore*, 164 Mich App 378, 383-384; 417 NW2d 508 (1987); mod on other grounds 433 Mich 851 (1989); see also *Herndon*, 246 Mich App at 420.

Particularly relevant in this case is the timing of the request, which came not only after the proofs were closed, but also after defendant was convicted. Even though the prosecution was aware that defendant was going to present an alibi defense, because of the timing of the motion to reopen the proofs, the prosecution would be prejudiced by having to, essentially, retry and reargue a case in which the prosecutor has already obtained a conviction.

Further, the evidence that defense counsel sought to admit was not newly discovered and the only condition that had changed was that the witnesses were supposedly going to be present to give testimony. Defendant offered no explanation why the witnesses failed to appear at trial.

Finally, defendant would be receiving an undue advantage because after being convicted he would be allowed to go back, introduce new evidence, and argue against conviction a second time. On appeal, defendant has not presented any support for a finding that the trial court may, much less should, be required to reopen the proofs after a verdict in a criminal trial.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Henry William Saad

/s/ Mark T. Boonstra